IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

Independent School District No. 276,
Minnetonka Public Schools,

EMPLOYER,

and

ARBITRATOR'S AWARD
BMS Case No. 05-PA-443
Grievance Arbitration

Minnetonka Teachers Association

UNION.

ARBITRATOR:	ROLLAND C. TOENGES
DATE & PLACE OF HEARING:	Minnetonka Public Schools Minnetonka, Minnesota August 3, 2005
DATE HEARING CLOSED:	October 1, 2005
DATE OF AWARD:	January 11,2006

ADVOCATES

FOR THE EMPLOYER	FOR THE UNION
Gregory S. Madsen, Attorney Kennedy & Graven	Harley M. Ogatta, General Counsel Education Minnesota

WITNESSES

Dennis Peterson, Superintendent Michael Lovett, Asst. Superintendent	Charles Kehrberg, MTA Negotiator Joseph Ricke, MTA President

ISSUE

Did the Employer violate the Collective Bargaining Agreement by discontinuing 40% release time for the new Minnetonka Teacher Association President, during the 2004-2005 school year?

JURISDICTION

The matter at issue, regarding interpretation of terms and conditions of the Collective Bargaining Agreement (CBA) between the Parties, came on for hearing pursuant to the grievance procedure contained in said agreement. The Grievance Procedure (Article IV, Subd. 3. Step III, b) provides that:

"If no agreement is reached following the [step 3] meeting, The Employer will, within five (5) days following the meeting, submit to the Association its written answer. The Association must submit the unresolved grievance to final and binding arbitration within ten (10) days after receipt of the Employer's answer. Such written request must be filed in the office of the Superintendent of Schools."

The Grievance Procedure further provides in Subd. 4, Step IV – Arbitration as follows:

"a. The Employer and the Association representatives shall, within seven (7) days after the request to arbitrate, set a meeting at which time they shall endeavor to select a mutually acceptable arbitrator to hear and decide the grievance.

b. If the Employer and the Association are unable to agree on an arbitrator, either party may request the State Bureau of Mediation Services to submit to the parties a panel of arbitrators. Such request to be made with five (5) days following the above meeting. Each party shall be responsible for equally compensating the arbitrator for fees and necessary expenses. The parties shall alternately strike names of arbitrators from panel of arbitrators received from the Bureau.

c. The arbitrator shall not have the power to add to, subtract from, or to modify in any way, the terms of this agreement.

d. The decision of the arbitrator shall be final and binding upon the parties. The decision shall be issued to the parties by the arbitrator and a copy shall be filed with the Bureau of Mediation Services, State of Minnesota."

The Parties selected Rolland C. Toenges as the Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The arbitration hearing was conducted as provided by the terms and conditions of the CBA and the Public Employment Labor Relations Act (MS 179A.01 – 30). The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute.

The Employer raised a procedural issue on the basis that the matter being grieved was not included in the CBA as a term and condition of employment and therefore did not meet

the definition of a grievance.[1] The Employer further supports its position that the matter is not properly before the Arbitrator by citing Article XIII, Section B, Subd. 1, (Complete Agreement Clause)[2] and Article IV, Section H, Subd. 4, Step IV, Arbitration, Paragraph c. [3]

Both Parties filed post-hearing briefs. The Arbitrator held the hearing record open until October 1, 2005, in the event that either Party wished to file a reply brief. Being none, the hearing record was closed thereon.

BACKGROUND

Minnetonka Public Schools, Independent School District No. 276 (Employer) operates a large suburban public school system. Teachers employed in the system, are represented by the Minnetonka Teachers Association (Union).

Superintendent Dennis Peterson and then Union President, Mark Chalupsky, made an oral agreement that provided for Chalupsky to have .4 (40%) *paid* release time from his teaching duties that would facilitate his work as Union President and communications between the Union and the Employer regarding matters of mutual interest.

When Chalupsky was later succeeded as Union President by Joseph Ricke, during the 2004-2005 school year, the Employer chose to end the release time arrangement. The Employer did so claiming that it was intended to apply to Chalupsky individually was established on a year-by-year basis and subject to change due to economic conditions.

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[1] Article IV, GRIEVANCE PROCEDURE

> "Section A. Grievance Definition: A grievance is defined as a dispute or disagreement as to the interpretation or application of any term or terms of this Agreement."

[2] Article XIII, DURATION AND EFFECT

> "Section B. Effect: Subd. 1. This Agreement constitutes the full and complete Agreement between the Employer and the Association. The provisions herein relating to terms and conditions of employment supersede any and all prior agreements, resolutions, practices, School District policies, rules or regulations inconsistent with or contrary to the provisions of this Agreement."

[3] Article IV, GRIEVANCE PROCEDURE

> Section H, 4, Step IV – Arbitration, Paragraph c. The Arbitrator shall not have the power to add to, subtract from, or to modify in any way, the terms of this Agreement.

The CBA is silent on the issue of requiring the Employer to release the Union President from teaching to perform Union business. While the Employer refers to an oral agreement with the then Union President that occurred on October 3, 2003, the Union claims that release time of 40% to 50% has occurred continuously since the early 1990's and has included two Union Presidents prior to the time Joseph Ricke became Union President.

JOINT EXHIBITS

J-1, Grievance Form dated June 30, 2004.

J-2, Memo, dated August 9, 2004, "Summary of Step II Grievance Meeting; District Response to the MTA."

J-3, Memo, dated August 19, 2004, "Appeal to Step III of the Grievance Procedure."

J-4, Memo, dated October 7, 2004, "Summary of Step III Grievance Meeting: District Response to the MTA."

J-5, Memo, dated October 25, 2004, "Appeal to Arbitration."

J-6, Collective Bargaining Agreement, Minnetonka Schools and Minnetonka Teachers Association, July 1, 2003 through June 30, 2005.

UNION EXHIBITS

U-1, "MTA Negotiations Summary Cost Analysis dated September 27, 2004.

POSITION OF THE PARTIES

THE UNION SUPPORTS ITS CASE WITH THE FOLLOWING:

1. There is a long-standing practice of the parties to grant the Union President 40% release time to perform the President's Union duties.

2. There has been an agreement between the Union and Employer since the early 1990's providing release time for the Union President that has varied between 40 to 50%

3. This long-standing arrangement has never before been questioned until the current grievance.

4. During this time period three people have held the position of Union President and all were provided release time except for the Grievant.

5. When the Union President office changed from Mark Chalupsky to the Grievant, the Employer unilaterally, and over the objection of the Union, refused to grant the 40% release time to the Grievant.

6. The Employer's response to the grievance indicates clearly that it knew there was an established past practice.

7. The Employer made a conscious effort to change the practice during the last round of negotiations.

8. The practice of granting release time to the Union President has been consistent, open and longstanding.

9. Under the "doctrine of implied obligation" the Employer may end the past practice, provided it gives proper notice to the Union and affords the Union an opportunity to bargain on the matter.

10. The Employer's position in negotiations was that there was no past practice and therefore no obligation to bargain on the matter.

11. If the Arbitrator finds that there is a past practice, the Employer by denying its existence has failed to take the necessary steps to change it and must continue the practice until successful in negotiating a change.

12. During the last round of negotiations, the Union attempted to incorporate language into the CBA memorializing the practice. The Employer refused but made no effort to otherwise change the practice.

13. The most compelling evidence that the Employer believed the practice would continue is that the President's release time was included as a cost of the CBA settlement package. This is evidenced by a joint stipulation of the Parties.

14. The failure of the Employer to honor its past practice appears due its employment of a new Superintendent who seems to have misunderstood the proper procedure for changing a past practice.

15. The Union requests the Arbitrator to order reinstatement of the 40% release time until such time as the Parties either negotiate something different or the Employer complies with the requirements of the "doctrine of implied obligation."

16. The Union also requests that the Arbitrator retain jurisdiction over the matter in dispute for a period of 30 days following the award should it be necessary to resolve any further disputes that might arise in implementing the award.

THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:

1. The instant grievance should never have been brought.

2. The undisputed evidence shows that the two negotiators of an October 3, 2003 oral agreement, concerning release time for the Union President, both understood the 40% release time only applied to Mark Chalupsky.

3. Therefore, there was no violation of the CBA or alleged past practice when the Employer denied 40% release time to the new Union President.

4. The grievance should also fail jurisdictionally because it does not constitute a "grievance" as defined in the CBA. To consider the matter a grievance would violate the "merger" or "Zipper" clause of the CBA.

5. For the Arbitrator to find the disputed matter a "grievance" under the CBA would exceed the Arbitrator's authority, whereby the Arbitrator is prohibited from adding to, subtracting from or modifying the terms of the CBA.

6. Based on the undisputed facts and applicable law the grievance must be denied.

7. The Employer having allowed release time for the former Union President may not be allowed to modify the clear and unambiguous language of the CBA (Article VI, Section E).

8. The clear and unambiguous language of Article VI, Section E, expressly permits "one member of the teaching staff" an *unpaid* "leave of absence to assume full-time duties on behalf of a Teacher Association. . ."

9. The CBA language is clear and explicit. The Arbitrator is constrained to give effect to the thought expressed by the words used.

10. Where a conflict exists between the clear and unambiguous language of the CBA and a long-standing past practice, the arbitrator is required to follow the language of the CBA.

11. Accordingly, evidence of the parties' release time practice may not be used to modify the unambiguous contract language governing the conditions under which a teacher may receive *unpaid* leave to "assume full-time duties" on behalf of the Union.

12. Even if the release time practice conflicts with the provisions of the CBA, the undisputed evidence unequivocally establishes that the *paid* release time was a product of periodic oral agreements between the Superintendent and the Union President and were entered into on a "year by year" or "CBA by CBA" basis.

13. A practice that is the result of an agreement or mutual understanding is subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is a past practice but rather to the agreement in which it is based.

14. The Arbitrator's function is not to rewrite the CBA and is limited to finding out what the Parties intended. The uncontroverted evidence that the two individuals (Superintendent and Union President) participated in the release time agreement compels the conclusion that the agreement was limited to Chalupsky and does not apply to the office of Union President.

15. It is undisputed that the two negotiators of the release time agreement (Superintendent and Union President Chalupsky) did not apply to the "office of Union President, but instead applied only to Chalupsky individually.

16. The Union admits that the practice of release time for the Union President changed over the years and the specific issue of release time for the President was negotiated CBA by CBA.

17. The Union also admits that the parties agreed not to put the terms of *paid* release time in the CBA. The oral agreement between the Superintendent and Union President Chalupsky came in the wake of the Employer having rejected the Union's negotiations proposal for the release time agreement to be made a part of the CBA language.

18. The Superintendent Peterson's undisputed testimony establishes that the oral release time agreement was subject to certain conditions and applied only to Chalupsky individually and not to the office of the Union President.

19. Superintendent Peterson testified that the release time applied only to Chalupsky as he had satisfied the Superintendent's expectations that the release time was being used to work collaboratively to resolve joint Union and Employer issues.

20. The Union's position is contrary to the recorded recollection of the only other individual party to the oral agreement (Chalupsky), who informed the Union in writing prior to the filing of the instant grievance that the 40% release time applied only to him.

21. The E-mail messages between Superintendent Peterson and Chalupsky of May 11, 2004 and May 13, 2004, compel the conclusion that the terms of the October 2003 agreement limited the paid release time to Chalupsky.

22. Including the expense of the Union President's release time ("Release Time for MTA President") in the cost of the CBA settlement does not change or contradict the scope of the October 2003 oral release time agreement.

23. Superintendent Peterson's testimony and evidence in the May 2004 E-mail communications from Chalupsky to Union Negotiator Cutshall forecloses any genuine dispute concerning the Employer's intent to restrict the *paid* release time to Chalupsky individually.

24. Superintendent Peterson's meeting with new Union President Ricke and other Union Officers in May 2004 was consistent with *paid* release time practice, notwithstanding that they were unable to reach a new release time agreement.

25. Application of the Arbitrator's award in the West St. Paul Teachers dispute does not control in the instant case due to differences in the Parties CBA.

    - In the instant case it is undisputable that the intent of Superintendent Peterson and Union President Chalupsky was for the release time to be restricted to Chalupsky and not conferred upon the office of Union President.
    - In West St. Paul there is no provision encompassing the *paid* release time at issue in the instant case.
    - In West St. Paul there was a specific CBA provision providing for "unusual" release time exclusively for the Union President.

26. The Arbitrator lacks jurisdiction to address the dispute presented in the grievance. There is a procedural issue that should result in denial of the grievance.

27. The instant grievance does not meet the CBA definition of a grievance because the *paid* release time agreement is not a part of the terms and conditions contained in the CBA.

28. The CBA restricts the Arbitrator's jurisdiction to an actual dispute over an existing term or condition of the CBA and provides that "the Arbitrator shall not have the power to add to, subtract from, or to modify in any way, the terms of this Agreement."

29. Article XII, Section B, Subd. 1 provides that the CBA "supersedes any and all prior agreements, resolutions, practices, School District policies, rules or regulations inconsistent with or contrary to the provisions of this Agreement."

30. There is no provision in the CBA that encompasses the *paid* release time that is at issue in the instant dispute. Further the evidence shows that although the Union has attempted to add such language, it has bee unsuccessful.

31. Accordingly the instant dispute fails to meet the definition of a grievance because it does not implicate a written term or condition of the CBA, which is silent on *paid* release time for the Union President.

32. Any agreements or implied agreements, such as that reached on October 2003 between the Superintendent, are barred by the "merger" or "Zipper" clause of the CBA to the extent they are "inconsistent with or contrary to" the provisions of the CBA.

33. The instant grievance fails not only because it does not present an arbitrable dispute, but further it is moot because the period at issue (2004-2005) school year) has ended.

    - The Grievant has been paid all the compensation due him during the 2004-2005 school year and was relieved each school day of having to fulfill the supervisory duty generally required of all teachers as a part of their contract day.

    - It would be wholly inappropriate to award the Grievant any monetary remedy as he has already received his full compensation.

34. For all the reasons set forth above, the Employer respectfully requests that the Arbitrator deny the grievance.

TESTIMONY

Union Witness Chuck Kehrberg, testified that he represented the Union in the 2001 – 2003 and 2003 – 2005 negotiations for a CBA. He put together issues and proposals and helped the Union team prepare for negotiations. He worked with two other Union representatives on the Union Negotiations Team. He negotiated with Employer representatives Superintendent Peterson, Assistant Superintendent Lovett and Consulting Attorney Dennis O'Brien, although Superintendent Peterson was not present in negotiations for the 2003 – 200 5 CBA.

Kehrberg testified that [paid] release time was important to the Union and on the table in the2001 – 2003 negotiations. On the last day of negotiations it was agreed that release time would be continued for the term of the CBA but there would be no language to that effect in the Agreement.

Kehrberg testified that it was exactly the same situation in 2003 – 2005 negotiations. The Union tried to negotiate [paid] release time language in the CBA, but being unsuccessful

finally agreed to accept it as an oral understanding. The Union wanted language in the CBA because of concern that the Employer may drop it.

Kehrberg testified that the Parties mutually agreed on a cost analysis of their CBA settlement, which included a cost for [paid] release time. The last day of negotiations was spent fine-tuning financial aspects. The Union President told him that the release time was going to continue but there would be no language in the CBA. Kehrberg testified that he was never promised that release was to be exclusive to Union President Chalupsky.

Employer Witness, Michael Lovett, Assistant Superintendent, testified that he is responsible for Human Resources and Administration. He has been the primary Employer contact for Union Representatives. He was the Employer Representative in negotiations along with Consulting Attorney, Dennis O'Brien. Lovett testified that he put together details of the tentative CBA negotiated with the Union[4] and presented it to the School Board for approval. Tentative agreement between the Parties was reached on 10/06/03 for the 2003 – 2005 CBA. The School Board ratified the Agreement on 10/23/03.

Lovett testified that on 10/10/03 he prepared a Memorandum to Management and the School Board setting forth details of the tentative agreement negotiated with the Union that included fine-tuning done with the Union.[5] Lovett testified that there was no reference in the Memorandum to release time for the Union President because it was not a part of the CBA.

Lovett testified that the instant grievance filed by the Union made no reference to what provision of the CBA was violated.[6] Lovett testified neither in the Step II[7] or Step III grievance meetings did the Union reference what provision of the CBA was violated. Lovett testified that Superintendent Peterson had told Chalupsky that he would be granted 40% of less release time via a private conversation.

Lovett testified that David Eaton, Minnetonka School Board Treasurer, prepared a summary of the Step III grievance meeting. This summary set forth in detail the Employer's reasons for denying the grievance.[8]

Lovett testified that the CBA in Article VI, LEAVES OF ABSENCE, Section E, Subd. 2 and Subd. 4, provides for "Professional Organization Leave." Lovett testified that these provisions are not applicable to the instant matter because they do not provide for paid leave and provide benefits only if expressly provided in writing by the School Board.[9]

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[4] Joint Exhibit #1.
[5] Employer Exhibit #1
[6] Joint Exhibit #1
[7] Joint Exhibit #2
[8] Joint Exhibit #4
[9] Joint Exhibit #1, Article VI, Section E.

Lovett testified that a summary of negotiations prepared in May 1997 references the Unions proposal for paid leave for the Union President among the unresolved issues.[10] Although there was no agreement to the Union's paid leave proposal, the Parties did agree to permit a leave of absence [without pay] for one member of the teaching staff to assume full-time duties on behalf of a Teacher Association for a period not to exceed two terms of office or six years which ever occurs first.[11] Lovett testified that there has been no request for this leave since 1998.

Lovett testified that the Union's position for language in the CBA, providing paid leave for the Union President, was contained as item #13 in a Union prepared document on 03/19/03.[12] Lovett testified that he was present in negotiations when the Union presented this proposal. Lovett said the Union's given reason for wanting this language was its concern that the Employer might quit providing release time for the Union President.

Lovett testified that he learned from Superintendent Peterson that he had a private conversation with Union President Chalupsky and the matter was resolved.

Lovett testified that the Employer had met several times with new Union President Ricke and discussed how he might use his time during the school day. The Employer directed

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> "Subd 2. A leave of absence granted under this Section shall be a leave without pay."
>
> "Subd. 4. In the event that a leave is granted under this Section, the teacher shall retain such amount of sick leave days and other accrued benefits, including experience credit, which the teacher had accrued prior to the leave for use upon the teacher's return. No accrual of leave, experience credit, or other shall take place during the time that the teacher is on leave unless the School Board has expressly provided for such in writing at the time of granting the leave."

[10] Employer Exhibit #2, Page 2

[11] Employer Exhibit #2, Page 6.

> "Section E. Upon request, one member of the teaching staff will be permitted a leave of absence to assume full-time duties on behalf of a Teacher Association for a period not to exceed two terms of office in said Association or six (6) years whichever occurs first."

[12] Employer Exhibit #3.

> "Item 13. Minnetonka Teachers Association release time President Guidelines in contract."

School Principals to develop schedules that provide flexibility to Mr. Ricke should he wish to meet with teaching staff or Employer representatives.[13]

Lovett testified that Superintendent Peterson authorized a special schedule for Union President Ricke that would give him flexibility to meet with teachers and Employer representatives.[14]

Lovett testified that release time for the Union President has changed over time. In the mid 1990s Union President Chalupsky, who was a Special Education Teacher, was allowed 50% release time but it varied from year to year. The two years when Chalupsky was not President, the Superintendent concluded that 40% release time was better as the Union President then was a Physical Education Teacher. Lovett testified that each year the release time situation was re-evaluated based on the needs of the School System.

Lovett testified that he never had a copy of Union Exhibit #1, but was familiar with the format - it is detailed costing of a negotiated agreement. Lovett testified that he doesn't know who prepared it. It is not the costing document he submitted o the School Board. Lovett testified he is puzzled why Union Exhibit #1 was prepared 09/27/04, nearly two weeks before the parties reached a tentative agreement. Lovett testified that he could speak to the information contained in Employer Exhibit #1, but not to the information contained in Union Exhibit #1.

On cross-examination, Lovett testified that the last negotiation session was the second week of October 2003. specifically 10/06/03. Lovett testified that there was still fine-tuning to be done on the tentative agreement, which was completed about 10/09/03 or 10/10/03. Lovett testified that he met with Chalupsky and Ricke on 10/02/03 when they were discussing what to do next as Chalupsky had asked him to be present. Lovett testified that he doesn't recall any conversation with them regarding release time then or through 10/08/03.

On cross-examination, Lovett testified that Superintendent Peterson told him that the release time issue was resolved as he (Peterson) was present when Chalupsky informed his Union colleagues on Monday 10/06/03 that it was resolved.

On cross-examination, Lovett responded in reference to the question, does the $1,014,336.00 total on Union Exhibit #1 include the cost of release time for the Union President, that he didn't know. Lovett later corrected his testimony and stipulated that the total of $1,014,336.00 on both Employer Exhibit #1 and Union Exhibit #1 is the same and includes the cost of release time for the Union President. Of $554,465.00 allocated to employee leave, $32,465 represents release time for the Union President.

On cross-examination, Lovett acknowledged that the "Non-Salary Items, Leaves" on page 4 of Union Exhibit is the estimated cost of release time for the Union President.

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[13] Joint Exhibit #2.page 3, Item C.
[14] Employer Exhibit #4, Page 2.

Lovett also acknowledged that his notes of 10/06/03 show release time on among issues to be resolved.

Superintendent Peterson testified that he is in his fifth year as Superintendent of Minnetonka Schools.

Peterson testified that he had a discussion with Chalupsky on 10/02/03 at Axel's Restaurant in Chanhassen. The conversation included their mutual concern about the unsettled negotiations for the new CBA and that the Union was talking about going to the School Board that evening.

Peterson testified that he and Chalupsky also discussed release time for the Union President. Peterson expressed his feeling that it had gone well and that there was no reason for it to be mixed into negotiations. Peterson testified that he emphasized that it had to be a year-by-year deal due to the tough financial situation. Peterson testified that Chaluspky agreed and they made a handshake agreement. Peterson testified that Chalupsky agreed that the release time issue shouldn't be an issue in negotiations and would not be.

Peterson testified that the release time was not discussed as a Union release time but clearly as an individual arrangement for Chalupsky that he [Peterson] was comfortable with continuing for Chalupsky.

Peterson testified that the Union had a recall election in mid April 2004 and Joseph Ricke became the new Union President. Peterson testified that he met with Ricke on April 30, 2004, and Ricke wanted to plan for his use of 40% release time. Peterson testified that he informed Ricke that the release time was an arrangement intended only for Chalupsky, but he would listen to Ricke's rationale for extending it to him. Peterson testified that he did not consider release time to be generic, applying to anyone that became Union President.

Peterson testified that he had three or four meetings with Ricke regarding the release time matter. Ricke was asked to set forth his vision of how he would use the time. Peterson testified that Ricke said he was entitled to the release time and didn't feel he needed to outline his vision of how he would use it. Ricke further indicated he was not interested in following the model of communications that existed between Peterson and Chalupsky. Peterson testified that Ricke did not convince him that granting him release time would be a service to the School District.

On cross-examination, Peterson testified that, notwithstanding Lovett's reference to release time for Chalupsky as a "past practice,"[15] he [Peterson] does not consider release

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[15] Joint Exhibit #2, Page 2, Para. B.

> "Subd. a. That during the last round of negotiations the District had consciously made a change in the past practice; Superintendent Peterson informed MTA

time as such for it had always been on a year-to-year basis and subject to change depending on economic and other circumstances. It was further subject to change based on the way Chalupsky would use his time, the functions he was performing and the events he would attend.

On cross-examination Peterson testified that he was not a part of the 2003-2005 CBA Negotiating Team and disagreed that a change in release time practice must be done at the bargaining table.

On cross examination Peterson testified that he does not consider release time for Chalupsky to be a "past practice" and would be surprised to hear that release time was an issue being negotiated in the last day of bargaining.

DISCUSSION

The instant dispute raises several complex issues, namely:

1. Does the release time granted Union President Chalupsky constitute a past Practice that meets the normally accepted standards required of a past practice?

2. Even if the release time granted Union President Chalupsky meets the normally accepted standards of a past practice, does the Union's failed attempt to negotiate it into the CBA have the effect of precluding the Union's right to pursue the matter as a CBA grievance?

3. Even if the release time granted Union President Chalupsky meets the normally accepted standards of a past practice, does the Zipper clause and other provisions of the CBA preclude it from being grievable?

The record shows that the release time arrangement for the Union President had been in effect since the early 1990's and had been afforded two previous Union presidents. The record also shows that the conditions of the release time had changed over time and was changed when there was a change in Union Presidents.

President Mark Chalupsky that he would consider release time on a year-to-year basis as a personal commitment, and that it would be .4 time or less."

An often-quoted definition of a "binding practice" is that it must be:[16]

- Unequivocal,
- clearly enunciated and acted upon,
- readily ascertainable over a reasonable period of time as a fixed, and well established practice accepted by both parties

The record shows that the release time practice was not unequivocal or clearly enunciated to the Union in general. The individual holding the Union Presidency at the time quite likely knew the details of the practice, but the evidence shows that others in the Union did not know the details.[17]

The record shows that although the release time practice had been in existence for a considerable period of time (since the 1990's), it was not fixed. The record shows that, notwithstanding the existance of the CBA, it varied in the amount of release time afforded (.4 to .5) and had been changed when there was a change in Union Presidents.[18]

The record shows that the release time as practiced was challenged by the Union, in at least the last two rounds of negotiations for the CBA. The Union's proposal was to negotiate language in the CBA setting forth the terms and conditions for *paid* release time, but the Employer did not agree. The Union sought such language because of its concern that the Employer would change the release time or discontinue it.[19]

It is a generally accepted principle in negotiations that the party proposing a change has the burden of proving that the change sought was achieved. In the instant case the Union was not able to achieve the change it sought, i.e. establishing the *paid* release time for the Union President as a term and condition of the CBA. This situation leads to the

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[16] Elkouri & Elkouri, How Arbitration Works, Fifth Edition at 632;

> "Indeed, Many arbitrators have recognized that, as stated by Arbitrator Jules J. Justin: In the absence of a written agreement, *past practice*, to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties."

[17] Employer Exhibit #5. E-mail message from Mike Cutshall to Chalupsky:

> "Mark, Could you let me know specifically what your agreement was with Dr. Peterson regarding the .4 release time for President. Did he say he would only honor it for the next two years with you, or with the MTA President."

[18] Testimony of Lovett and Peterson

[19] Testimony of Charles Kehrberg

conclusion that the Employer prevailed, as the Union was unsuccessful in the achieving the change it sought. [20]

The record shows that although there is a provision in the CBA providing leave for an employee appointed to Union Office, it does not apply to the instant matter involving release time granted the Union President. Article VI, Leaves of Absence, Section E. Professional Organization Leave differs in that it applies to a teacher who assumes *full time* duties on behalf of a teacher organization, is to be *unpaid* and is to be *without benefits*.[21]

In support of its position, the Employer argued that the matter at issue was subject to applicable law. Minnesota Law appears to address situations such as the release time arrangement at issue. MS 179A. 13. Subd. 3, (10) provides that it is an unfair practice for a employee or employee organization to cause or attempt to cause *pay* for services not performed or not to be performed.[22] A fair reading of this statute would indicate that a labor organization is prohibited from attempting to extract *pay* for time that does not provide a service to the Employer. The record shows that Superintendent Peterson considered Chalupsky's 40% *paid* release time as providing a service to the School District by establishing a constructive communications link between himself and the Union. The record shows that Superintendent Peterson did find such a constructive communication link to exist with Ricke. Ricke did not cooperate when asked to outline how he intended to use the release time and further indicated he was not interested in the

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[20] Elkouri & Elkouri, How Arbitration Works, Fifth Edition at page 638:

> "In permitting unilateral change by management, arbitrators sometimes have pointed out that the matter may be subject to negotiations if requested by the union; but, if any such negotiations fail to produce agreement, management may exercise its unilateral judgment in making or continuing the change."

[21] An exception is allowed for benefit coverage if expressly approved in advance by the School Board.

[21] MS 179A.13 UNFAIR LABOR PRACTICES

> "Subd 3. E**mployees**. Employee Organizations, their agents, or representatives, and public employees are prohibited from;
>
> > (10) causing or attempting to cause a public employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed;"

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model of communication that had existed between Peterson and Chalupsky. While the Statute does not appear to prohibit the *paid* release time arrangement afforded Chalupsky, it does appear to prohibit the Union from attempting to extract *paid* release time when the Employer does not consider it as providing a service.[23]

For the reasons set forth above, the Arbitrator finds that *paid* release time for the Union President does not constitute a binding past practice. Therefore, the matter does not meet the definition of a grievance as set forth in the CBA as it is not subject to the terms and conditions of the CBA.

AWARD

The grievance is denied. The matter grieved is not a binding past practice and does not fall within the purview of the CBA.

CONCLUSION

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 11th day of January 2006 at Edina, Minnesota.

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ROLLAND C. TOENGES, ARBITRATOR

[23] The record shows that Ricke was not provided the same *paid* release time arrangement as was Chalupsky, but was afforded special schedule arrangements that would facilitate his work as Union President.